

Approved Change 11-02 (Article 120 Affirmative Defenses)

Insert the following new NOTE 1.1 immediately following the current NOTE 1 in Instructions 3-45-3, 3-45-4, 3-45-5, 3-45-6, 3-45-7, 3-45-8 and 3-45-11:

NOTE 1.1: Article 120 Affirmative Defenses. When applying an affirmative defense to an Article 120 offense – whether instructing members or judge alone – the military judge **MUST include the following statement on the record:**

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language “The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden,” in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge’s Benchbook, DA Pam 27-9.